INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Statutes of the State, the validity of which is involved	2
Dates of the judgment and application for appeal	3
The Emergency Inheritance Tax	5
The Wisconsin Estate Tax	12
Appendix "A"—Opinion of the Supreme Court of Wisconsin	17
Appendix "B"—Motion of respondent for revision of judgment consistent with opinion of the Supreme Court of the United States	20
Appendix "C"—Motion for judgment on remand from Supreme Court of the United States	21
Appendix "D"—Prior Computation of the Wisconsin Death Taxes reversed by the Supreme Court of the United States	23
Appendix "E"—Recomputation of Wisconsin Death Taxes of the Wisconsin Department of Taxation adopted by the Supreme Court on remand	24

Table of Cases Cited

Continental Ins. Co. v. *Reading Co.*, 259 U. S. 156	4, 15
Estate of Miller, 254 Wis. 24	1
Fargo v. *Hart*, 193 U. S. 490	9, 11
Great Northern Ry. Co. v. *Washington*, 300 U. S. 154	11
Home Savings Bank v. *Des Moines*, 205 U. S. 503	6
McCulloch v. *Maryland*, 4 Wheat. 316	12, 15
Meyer v. *Wells Fargo and Company*, 223 U. S. 298	9
Miller v. *City of Milwaukee*, 272 U. S. 713	12, 14
Mitchel v. *U. S.*, 40 U. S. 52	16

Page

Owensboro National Bank Company case, 173 U. S. 664 6
Southern Ry. Co. v. *Kentucky*, 274 U. S. 76 11
Treichler v. *Wisconsin*, 338 U. S. 251 ..... 1, 5, 7, 9, 12
Wallace v. *Hines*, 253 U. S. 66 10

STATUTES CITED

Constitution of the United States:

Article I, Section 8, Clause 1 ..... 2, 12, 16
Article VI, Clause 2 ..... 2, 12, 15
14th Amendment 2, 8, 12

Wisconsin Statutes of 1943:

Section 72.50 2
Section 72.74(2) 2

United States Code:

Title 26, Section 813B 13
Title 28, Section 1257 2

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1948

No. 43

IN RE WILL OF FRED A. MILLER, DECEASED

STATE OF WISCONSIN,

Appellant,

vs.

OSCAR F. TREICHLER, EXECUTOR,

Respondent

JURISDICTIONAL STATEMENT UNDER AND PURSUANT TO RULE 12, PARAGRAPH 1, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

(a) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Wisconsin entered and filed June 30, 1950, copy of which is hereto attached and marked Appendix "A", purporting to be in conformity with the judgment of the Supreme Court of the United States in the same cause rendered and entered November 7, 1949, (*Treichler* v. *Wisconsin,* (338 U. S. 251), reversing the State Supreme Court's prior judgment (*Estate of Miller,* 254, Wis. 24) and remanding it to the latter for further proceedings not inconsistent with the mandate of the former.

The State Supreme Court judgment on remand was entered on motions filed by the above named executor and the

above named State of Wisconsin, copies of which motions are hereto attached, and marked Appendices "B" and "C", respectively.

It is the contention of the above named executor that the judgment of the State Supreme Court on remand is not responsive to and fails in material respects to conform to the judgment of the Supreme Court of the United States in this cause, for the reasons hereinafter more particularly set forth.

The judgment of the State Supreme Court on remand, it is believed, offends against the due process clause of the 14th Amendment, as originally contended in this cause, but in its present form now also offends against the equal protection clause of that amendment and particularly against the taxing and supremacy clauses of the Federal Constitution itself, namely Article I, Section 8, Clause 1 and Article VI, Clause 2 thereof, respectively.

The Federal Statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257, clause (2), Title 28 of the United States Code, and the practice of this court where on remand to a lower court, the judgment of the lower court on such remand is asserted to be in contravention of the mandate of the Supreme Court of the United States in the same cause.

(b) The Statutes of the State of Wisconsin which are involved on this appeal so far as pertinent are Sections 72.74 (2) Wis. Stats. of 1943, foot of page 1177 and head of p. 1178, imposing the emergency tax on inheritances, and 72.50, Wis. Stats. of 1943, foot of page 1176 and head of page 1177, imposing the Wisconsin Estate Tax. They read as follows:

> "72.74 *Emergency tax on inheritances.* (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax

for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

"72.50 *Tax imposed.* In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty percent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19. (1931 c. 426)

(c) The date of the judgment of the Supreme Court of the State of Wisconsin sought to be reviewed is, as aforesaid, June 30, 1950, and the date upon which the application for the appeal was presented is July 24th, 1950.

On the first appeal in this cause to the Supreme Court of the United States, the statute first quoted was the only

statute expressly challenged under the due process clause of the 14th Amendment, and the second statute, imposing the Wisconsin Estate Tax, was challenged in the brief of the executor in the United States Supreme Court. It is now also expressly challenged on this appeal for the reason that the principles laid down by the United States Supreme Court with reference to the first quoted statute are equally and with greater force applicable to the last quoted statute imposing the Wisconsin Estate Tax, the emergency tax being directly measured by the Wisconsin Estate Tax.

In support of this express challenge to the validity of the Wisconsin Estate Tax, the following citation is believed to be in point. In *Continental Ins. Co.* v. *Reading Co.*, 259 U. S. 156, at pp. 165, 166, the Supreme Court of the United States held, as follows:

> "• • • Ordinarily the scope of our review of the decree of the District Court would be limited to the assignments of error of the appellants, but in this case, as the decree which is before us was entered under a mandate of this court, we have jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the District Court the duty of formulating a decree in compliance with the *principles* announced in our judgment of reversal, and that gives us *plenary power*, where the compliance has been attempted and the decree in any proper way is brought to our attention, to see that it follows our opinion." (Emphasis added)

It will be observed that by its brief per curiam decision on remand, the State Supreme Court is content to accept the recomputation of the death taxes due in the matter of this estate, as made by the Wisconsin Department of Taxation, and as so computed, declares them to be in conformity with the mandate of the Supreme Court of the United States. This recomputation, it will also be seen,

purports to prorate the federal credit for the purpose of the emergency tax only, but does not prorate it for the purpose of the Wisconsin Estate Tax itself.

THE EMERGENCY INHERITANCE TAX

By reference to the recomputation appearing in the table prepared by the Wisconsin Department of Taxation, annexed to the opinion of the Supreme Court of Wisconsin on remand (Appendix "A"), it is made to appear that the only difference between the 30% emergency tax measured by the federal credit as now recomputed by it and the same tax measured by the same credit as computed by it prior to the reversal of the judgment of that court by the Federal Supreme Court is in the sum of $6,453.91, or 6.09% of the latter, whereas the extraterritorial tangible property is actually 12.48% of the estate of the decedent. This, on the face of it, is believed to be a *reductio ad absurdum*. This result is shown to be so by the tables appended hereto marked Appendices "D" and "E" and notes 1 and 2 at the foot of Appendix "E".

That such computation is wholly at variance with the decision of the Supreme Court of the United States is apparent from the fact that the State, in that court, attempted to justify its position by advancing the proposition that the ultimate economic thrust or incidence of the tax is the true criterion of whether or not the tax is valid or invalid. But the Supreme Court of the United States rejected this argument of economic equivalency as a criterion of the validity or invalidity of the tax when it expressly ruled in the *Treichler* case, 338 U. S. at p. 254, as follows:

> "The court below thought that the presence of 87.52% of Mr. Miller's property within Wisconsin justified its statement that the state taxed only Wisconsin property. And the state argues that the 'other 20%' over the federal basic estate tax 80% credit 'more than absorbs

> or is, on any mathematical basis, attributable to' the 12.48% of property outside Wisconsin. But Wisconsin made but 80% of the federal tax its own; *and as it did not apportion that 80% to property within the state, the presence of property therein is simply a fortuity which cannot help the taxing jurisdiction.* See Owensboro National Bank v. Owensboro, (1899) 173 U. S. 664, 683, 19 S. Ct. 537, 542, 43 L. Ed. 850. *The same must be said of deductions for out-of-state taxes, which have no necessary relation to the proportion of property outside Wisconsin.*" (Emphasis added)

In the *Owensboro National Bank Company* case, cited in the opinion, the court had theretofore held (173 U. S. at p. 683)

> "If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the Act of Congress, then that Act becomes meaningless and the power to enforce it in any given case will not exist. This follows that if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid does not strike us as worthy of serious consideration."

This question, therefore, resolves itself into a pure question of power to do one or the other thing. It was so expressly ruled in *Home Savings Bank* vs. *Des Moines*, 205 U. S. 503, at p. 519, cited to the Federal Supreme Court by the executor:

> "It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion.

> But the two kinds of taxes are not equivalent in law, because the state has the power to levy one and has not the power to levy the other. The question here is one of power, and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence."

Thus in recomputing the emergency tax levied on the federal credit, it will be seen that the State again insists upon employing the out-of-state taxes in computing the emergency tax attributable to property outside of Wisconsin in the teeth of the ruling of the Federal Supreme Court that "out-of-state taxes * * * have no necessary relation to the proportion of property outside Wisconsin." *Treichler* case, 338 U. S. at p. 255 *supra.* And again in recomputing the emergency tax, it still employs the normal tax as a factor, but the high federal tribunal ruled in the *Treichler* case, 338 U. S. at p. 254 as follows:

> "It will be seen that as the taxing formula is reduced, the normal inheritance tax is no longer a factor in the computation."

Are not these rulings now the law of the case, under the repeated decisions of that tribunal? Under these rulings the emergency taxes in this estate are measured as a unit by the federal credit.

But the fundamental error in the State's computation is deeper than this. It assumes that by prorating the federal credit by taking 87½% thereof as the base upon which the emergency tax thereon is computed, the Department of Taxation thereby makes a fair apportionment, but such is emphatically not the case because the out-of-state tangible property, which enters into the determination of the amount of that credit, throws the federal tax into progressively higher brackets. Thus such credit is materially higher than where out-of-state tangible property is

excluded from the federal tax base. *It follows that any given percentage of the federal credit, whether it be 87½, 50%, 25% or any other fraction thereof, will always be measured by extraterritorial property.* Accordingly the federal credit on the same Wisconsin estate of any two decedents who are both domiciled in Wisconsin, but where one estate has in addition thereto extraterritorial property, will as to the latter's estate always be materially discriminated against in the emergency tax payable by it as the following table will clearly show:

Amount of Net Estate (After all deductions and exemptions Attributable to Wisconsin***		Amount of Extra-territorial Property	Federal Credit	Apportionment	30% Emergency Tax
A. $2,000,000	plus	$2,000,000	$290,800	½=$145,400	$43,620
B. 2,000,000		None	106,800	All 106,800	32,040
				*Excess	$11,580
A. $4,000,000	plus	$4,000,000	$786,800	½=$393,400	$118,020
B. 4,000,000		None	290,000	All 290,000	87,000
				*Excess	$31,020
***A. $6,843,043.95		(Total net estate both with and without Wisconsin)	$630,709	⅞=$551,870	$165,561
**B. $3,803,378.42		None	259,951	All 259,951	77,985
				*Excess	$87,576

Miller Estate is shown in this block employing hypothetically created credit in line B.

---

* Excluding deduction for out-of-state property taxes which U. S. Supreme Court has said has no necessary relationship to the tax. This result is due to the fact that the extraterritorial property as before stated, increases the tax base (i. e. federal credit) on which the emergency tax is computed over and above what it would be were only Wisconsin estate employed in computing an assumed federal credit other than the actual credit prescribed by sec. 72.50 Wis. Stats. (Wisconsin Estate Tax). This is so because the extraterritorial tangible property throws the total federal tax into progressively higher brackets, a result equally offensive under the due process and equal protection clauses of the 14th Amendment.

** Net estate subjected to taxation in Wisconsin i. e. clear market value under Chapter 72 Wis. Stats., Transcript of Record, U. S. Supreme Court, p. 3, *Treichler* v. *Wisconsin*.

*** Under U. S. Revenue Act of 1926.

Counsel for the executor freely admits and without cavil, that in arguing this cause in the high federal tribunal he was of the opinion and so stated in his brief that the federal credit might hypothetically be apportioned in the case at bar by taking 87½% thereof, but contended that this required the exercise of the legislative rather than the judicial function. But the Federal Supreme Court disposed of this hypothesis by observing as it did in Note 3, appended to the opinion (*Treichler* case, 338 U. S. at p. 251) as follows:

> "A different question might be presented, however, if the statute in question authorized computation to begin with 87.52% rather than all of the 80% federal credit. We intend to intimate no opinion as to that situation."

This comment prompted counsel for the executor to reexamine his hypothesis, the result of which, as is hereinbefore demonstrated, shows conclusively that such an apportionment would not only be grossly unfair but would again be measuring the 30% emergency tax in part by extraterritorial tangible property as hereinbefore shown.

The Federal Supreme Court has consistently held that an apportionment, even though made by legislative action which is unfair, is invalid. Thus in the leading case of *Meyer* v. *Wells Fargo and Company*, 223 U. S. 298, the court in striking down a gross revenue act of the State of Oklahoma, observed as follows at page 300:

> "The plaintiff's receipts are largely from commerce among the states, and it also receives large sums as income from investments in bonds and land all outside the state of Oklahoma. So that it is evident that if the tax is what it calls itself, it is bad on the former ground, and that whatever it is, it is bad on the latter. Fargo v. Hart, 193 U. S. 490. *In that case the tax was proportioned to mileage, and it was held that it could*

not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts, increased by the special outside sources of income, and taxing a proportion of this total fixed by the ratio of business within the state to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in Galveston, H. & S. A. R. Co. vs. Texas, 210 U. S. 217, as to show that, if one is not copied from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that" (Emphasis added).

• • • • • • •

We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the state" (Emphasis added).

It ruled to the same effect in *Wallace* v. *Hines*, 253 U. S. 66, at pages 69, 70, as follows:

"(4) The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state."

"Hence the possession of bonds secured by the mortgage of land in other States, or of a land-grant in

another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax,—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 364. In this case, it is alleged, that the tax commissioner's valuation included items of the kind described in very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. Fargo v. Hart, 193 U. S. 490; Union Tank Line Co. v. Wright, 249 U. S. 275, 282 (Emphasis added).

To the same effect see the following cases:

Fargo v. *Hart*, 193 U. S. 490;
Southern Ry. Co. v. *Kentucky*, 274 U. S. 76.

It will be noted in connection with the contention of the executor at the bar of the Federal Supreme Court that the terms and conditions of an apportionment formula require the exercise of the legislative, rather than the judicial function, but whether legislative or judicial, that court expressly held in *Great Northern Ry. Co.* v. *Washington*, 300 U. S. 154, at page 161, as follows:

> *"And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation. If the exaction be clearly excessive it is bad in toto and the state cannot collect any part of it"* (Emphasis added).

This case decided in 1937 has not since been overruled or questioned as the U. S. Supreme Court Citator will show.

It is therefore believed that the State's recomputation of the tax in controversy insofar as it relates to the 30%

emergency tax, finds no support in the facts or the law in the light of the controlling opinion of the United States Supreme Court herein and the principles of law and authorities hereinbefore cited.

THE WISCONSIN ESTATE TAX

It will be noted, as before stated, that the judgment of the State Supreme Court on remand did not apportion the federal credit in the computation of the Wisconsin Estate Tax itself. But in the executor's motion for judgment in conformity with the mandate of the Supreme Court of the United States, he raised the question before the State Supreme Court (Question 4) whether the Wisconsin Estate Tax (Sec. 72.50) was also invalid, and contended that it was so for the same reasons assigned by the Supreme Court of the United States in holding invalid the Wisconsin Emergency Tax, citing in addition to the 14th Amendment, the taxing and supremacy clauses of the Federal Constitution, Article I, Section 8, Clause 1 and Article VI, Clause 2, as those clauses have been interpreted in *M'Culloch* v. *Maryland*, 4 Wheat 316, and *Miller* v. *City of Milwaukee*, 272 U. S. 713. This contention was pressed in the executor's argument before the State Supreme Court on remand but the opinion is silent on the point so raised, and, as hereinbefore noted, in the recomputation approved by it no attempt has been made to prorate the Wisconsin Estate Tax so challenged.

In its reference to the Wisconsin Estate Tax in the *Treichler* case, 338 U. S. at p. 253, the Supreme Court of the United States observed as follows:

> "• • • The Estate tax on this estate was computed at $352,701.79. However, this provision of the Wisconsin statutes is not under *explicit* attack here." (Emphasis added.)

The word "explicit" was, it is submitted, advisedly employed because the executor did attack the constitutionality of the Wisconsin Estate Tax in support of its assignment of error with respect to the emergency tax. I quote from the Appellant Executor's Reply Brief on file in the Federal Supreme Court, at page 4:

> "• • • Surely the state should not be heard to complain because of the Appellant's failure to assign as error the failure to apportion the Wisconsin Estate Tax, a tax which in Appellant's opinion is also subject to apportionment. • • • The taking is nevertheless beyond the taxing state's power."

One should clearly keep in mind that the federal credit is not a grant by the Congress to the several states, for the credit by its express terms is extended to the taxpayer and not to the state (26 U. S. Code, Sec. 813 B). When the states, therefore, in order to cover into their treasuries all or any part of the credit so extended to the taxpaying estate, levy a state tax therefor, they may not under the holding in this and the *Frick* cases employ the credit as a measure of the tax without apportionment as between property within and without its taxable jurisdiction, since Congress alone possesses the power to levy an estate or inheritance tax on the value of property beyond the taxable jurisdiction of any one of the states.

When the Federal Supreme Court said that the Wisconsin Estate Tax was not under "explicit" attack, it could, it is believed, have meant nothing less than it was under *implicit* attack and such indeed it was, for that tax was also measured by extraterritorial tangible property and to that extent a clear usurpation of the taxing power of the state.

Moreover, in respect to the Wisconsin Estate Tax, by reference to the table set forth on page 8, under the columns

designated as "Federal Credit" and "Apportionment" it will be at once observed that an estate of a Wisconsin decedent, consisting of intra and extraterritorial property, is put at a gross disadvantage with respect to the estate of a Wisconsin decedent consisting wholly of intra-state property where the intra-state property is exactly the same in the case of both estates. Thus an arbitrary discrimination in contravention of the equal protection clause of the 14th Amendment results without any constitutional basis whatever therefor.

Finally, not only is the Wisconsin Estate Tax measured by property beyond the taxable jurisdiction of the State of Wisconsin, but it also operates to impair the taxing power of the Federal Government (Article I, Section 8, Clause 1, U. S. Constitution), in that by the levy of the Wisconsin Estate Tax, expressly declared by the statute imposing it, to have for its *purpose* the absorption of the *entire* federal credit, it operates to diminish, by a usurpation of state power, the federal tax *pro tanto* to the extent that it imposes a tax measured by extraterritorial tangible property and to withdraw from the federal treasury and cover into the state treasury monies which it is not entitled to appropriate. It does this by the levy of a tax on extraterritorial tangible property which Congress, aside from the state of situs, alone may tax.

The Supreme Court of the United States ruled in *Miller* v. *City of Milwaukee*, 272 U. S. 713, at p. 715:

> "If the *avowed purpose* or *self-evident operation* of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." (Emphasis added.)

This case has since frequently been cited with approval by the Federal Supreme Court.

The Wisconsin statute there involved was challenged on the ground that it trenched on the borrowing power of the Federal Government. The Wisconsin statute here involved, by its express terms and design, operates to trench on the taxing power of the Federal Government. The controlling principle, applicable in both instances, is precisely the same for such acts on the part of the State are in contravention of the supremacy clause of the Federal Constitution, Article VI, Clause 2, as that clause has been interpreted in *M'Culloch* v. *Maryland*, 4 Wheat 316, and thereafter in an unbroken line of decisions to the present day.

It is submitted that the opinion of the Supreme Court of the United States in the case now before this court and the *principles* of law therein laid down are now the overriding law of the case and that regardless of any assignments of error made by any party to a cause prior to the definitive opinion of the high federal court, all questions in the case must be reviewed in the light of such controlling principles. That this is so, is clearly manifest from the rulings of the Federal Supreme Court when the cause originally before it, is referred to it a second time for the purpose of determining whether the lower tribunal has carried out its mandate. At the risk of needless repetition, the executor takes the liberty to again quote from the opinion in *Continental Ins. Co.* v. *Reading Co.*, 259 U. S. 156, *supra*, wherein the court at pp. 165, 166, held:

> "• • • Ordinarily the scope of our review of the decree of the District Court would be limited to the assignments of error of the appellants, but in this case, as the decree which is before us was entered under a mandate of this court, we have jurisdiction to consider on our own motion whether our mandate

has been complied with. We delegated to the District Court the duty of formulating a decree in compliance with the *principles* announced in our judgment of reversal, and that gives us *plenary power*, where the compliance has been attempted and the decree in any proper way is brought to our attention, to see that it follows our opinion." (Emphasis added.)

The following citation to the same point is also deemed apposite:

Mitchel v. The United States, 40 U. S. 52, at p. 84, wherein the court ruled:

" 'The proceedings in the original suit are always before the court, so far as to determine any new points between the parties' ". (Emphasis added.)

It is accordingly submitted that the Wisconsin Estate Tax itself is not only invalid under the due process and equal protection clauses of the 14th Amendment as a usurpation of State power in that it purports to measure the tax by extraterritorial tangible property, and discriminates as between Wisconsin decedents' estates property without a constitutional basis, but that it also is invalid as an impairment of the taxing power of the Federal Government under Article I, Section 8, Clause 1, of the Federal Constitution. Does there appear to be room for any substantial doubt that this conclusion must logically follow if either ground of challenge is valid?

Dated July 24th, 1950.

A. W. Schutz,
Attorney for Appellant, Executor.

APPENDIX "A"

Filed Jun. 30, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

STATE OF WISCONSIN : IN SUPREME COURT, AUGUST TERM, 1948

No. 43

In re Estate of FRED A. MILLER, Dec'd., STATE OF WISCONSIN, Appellant,

v.

OSCAR F. TREICHLER, Ex'r., Respondent

This is a motion for judgment on remand of the record from the United States Supreme Court. On November 7, 1949 that court decided that "Wisconsin's emergency inheritance tax is invalid insofar as it is measured by tangible property outside Wisconsin." *Treichler* v. *Wisconsin* (1949), 338 U. S. 251, 257, 70 Sup. Ct. 1, 94 L. Ed. 20.

In that case the United States Supreme Court reversed a decision of this court (*Estate of Miller* (1948), 254 Wis. 24, 35 N. W. (2d) 404).

When this case was before us originally, we concluded that since the federal government retained twenty per cent of the estate tax imposed by it and made only eighty per cent of such tax available to the State of Wisconsin, an additional tax based thereon was legal. We arrived at this conclusion not because of any misconception of the law stated in *Frick* v. *Pennsylvania* (1925), 268 U. S. 473, 69 L. Ed. 1058, 45 Sup. Ct. 603, that any tax attempted to be levied by a state on property outside its borders is illegal, but because of the fact that eighty-seven per cent of the property of the Miller estate was within Wisconsin. The United States Supreme Court, however, ruled that the Wisconsin law and the Pennsylvania law were one.

> "It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction."

The court went on to say:

> "But when a state reaches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction. Since the state of location has all but complete dominion over the physical objects sought to be measured for tax, see Green v. Van Buskirk, (U. S.) 7 Wall 139, 150, 19 L. ed. 109, 113 (1869); Curry v. McCanless, 307 U. S. 357, 363, 83 L. ed. 1339, 1345, 59 S. Ct. 900, 123 ALR 162 (1939), and cases cited, no other state can offer a *quid pro quo.*"

The court then ordered the case remanded for proceedings not inconsistent with its opinion.

Counsel for the taxpayer contends that the entire thirty per cent tax is invalid if sought to be applied to this estate or, put another way, that the $630,000 recaptured from the federal government constitutes a ceiling beyond which the state cannot go.

We are of the opinion that the tax law must be construed, if possible, so as to be constitutional. As stated above, we sought in the former opinion to apply the law only to property in Wisconsin and thought that we had succeeded. It has now been pointed out that the basis used there was so broad as to include property having a situs in other states. Neither misapplication of a law, nor the fact that it can be misapplied, renders it unconstitutional.

The legislature must have intended that the tax be computed only upon property having a situs within the state of Wisconsin.

The tax authorities have now recomputed the tax upon a base of eighty-seven per cent of the amount recaptured from the federal government, which clearly does not permit of a claim that Wisconsin is attempting to tax property which lies outside this state. We are therefore of the opinion that the state is entitled to the entry of judgment against the estate for the amount shown by the new computation of the Department of Taxation, and that when so entered it will not be inconsistent with the mandate of the United States Supreme Court referred to above.

tax, be first deducted from the Wisconsin estate tax in the computation of the last named tax?

4. Is the Wisconsin estate tax levied by Section 72.50 to 72.61 of the Wisconsin Statutes also invalid?

(S.) A. W. Schutz, Counsel for the above named Respondent Oscar F. Treichler, Executor.

APPENDIX "C"

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1948

No. 43

In re Will of FRED A. MILLER, Deceased

STATE OF WISCONSIN, *Appellant,*

vs.

OSCAR F. TREICHLER, *Respondent*

Motion for Judgment on Remand from Supreme Court of the United States

The Appellant above named respectfully moves this Court that, in accordance with the judgment of the Supreme Court of the United States entered November 7, 1949, in the cause entitled Oscar F. Treichler, Executor of the Estate of Fred A. Miller, Appellant, v. State of Wisconsin, case No. 20, October Term 1949, and the mandate issued therein, judgment be entered herein reversing the order of the County Court for Milwaukee County, State of Wisconsin, entered January 30, 1948, determining the Wisconsin inheritance taxes payable in the estate of Fred A. Miller, deceased, and remanding the cause with directions to enter an

order determining the Wisconsin inheritance taxes payable in said Estate as follows:

(1) Wisconsin Normal Inheritance Taxes			$220,682.12
(2) Wisconsin Estate Tax:			
80% of U. S. Estate tax		$630,709.62	
Less: (a) Wis. Normal Taxes	$220,682.12		
(b) Ill. Inheritance Taxes	35,616.26		
(c) Florida Inheritance Taxes	21,709.45		
Total State Taxes		270,007.83	
Difference			352,701.79
(3) Wisconsin Emergency Tax:			
(a) Wisconsin Normal Inherit. taxes		220,682.12	
30% additional tax thereon			66,204.64
(b) Wisconsin Estate Tax:		352,701.79	
80% of U. S. Estate Tax	630,709.62		
87½%—ratio of Wis. property to total estate	551,870.92		
U. S. Estate Tax credit attributable to property outside Wis.	78,838.70		
Illinois Inheritance Tax	35,616.26		
Florida Inheritance Tax	21,709.45		
Out-of-state taxes deducted	57,325.71		
Wisconsin Estate Tax measured by property out of Wisconsin		21,512.99	
Wisconsin Estate Tax attributable to Wisconsin property		331,188.80	
30% additional tax thereon			99,356.64
Total Wisconsin Inheritance Taxes			738,945.19

Dated February 24, 1950.

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin,

(S.) HAROLD H. PERSONS,
Assistant Attorney General,

NEIL CONWAY,
Inheritance Tax Counsel,
Attorneys for Appellant.

APPENDIX "D"

The Prior Computation of the Wisconsin Death Taxes Reversed by the Supreme Court of the United States, Reproduced in *Treichler* case, 338 U. S. at p. 255.

(1) Wisconsin Normal Inheritance Taxes			$220,682.12
(2) Wisconsin Estate Tax:			
80% of U. S. estate tax		$630,709.62	
Less: (a) Wis. Normal Taxes	$220,682.12		
(b) Ill. Inherit. Taxes	35,616.26		
(c) Fla. Inheritance Taxes	21,709.45		
Total State Taxes		270,007.83	
Difference			352,701.79
(3) Wisconsin Emergency Tax:			
Wisconsin Normal Taxes	220,682.12		
30% additional tax thereon		66,204.65	
Wisconsin Estate Tax	352,701.79		
30% additional tax thereon		105,810.55	
Total 30% Emergency Tax			172,015.20
Total Wisconsin Inheritance Taxes			$745,399.11

APPENDIX "E"

Recomputation of Wisconsin Death Taxes of the Wisconsin Department of Taxation Adopted by Wisconsin Supreme Court on Remand, Appendix "A"

(1) Wisconsin Normal Inheritance Taxes			$220,682.12
(2) Wisconsin Estate Tax:			
80% of U. S. Estate tax		$630,709.62	
Less: (a) Wis. Normal Taxes	$220,682.12		
(b) Ill. Inheritance Taxes	35,616.26		
(c) Florida Inheritance Taxes	21,709.45		
Total State Taxes		270,007.83	
Difference			352,701.79
(3) Wisconsin Emergency Tax:			
(a) Wisconsin Normal Inherit. taxes		220,682.12	
30% additional tax thereon			66,204.64
(b) Wisconsin Estate Tax:		352,701.79	
80% of U. S. Estate Tax	630,709.62		
87½%—ratio of Wis. property to total estate	551,870.92		
U. S. Estate Tax credit attributable to property outside Wis.	78,838.70		
Illinois Inheritance Tax	35,616.26		
Florida Inheritance Tax	21,709.45		
Out-of-state taxes deducted	57,325.71		
Wisconsin Estate Tax measured by property out of Wisconsin		21,512.99	
Wisconsin Estate Tax attributable to Wisconsin property		331,188.80	
30% additional tax thereon			99,356.64
Total Wisconsin Inheritance Taxes			738,945.19

Note 1. The figures 78,838.70 and 21,512.99, in 3 (b) are irreconcilable with one another and with the opinion of the U. S. Supreme Court.

Note 2. The figures 220,682.12, the normal tax, and 66,204.64, the emergency surtax thereon, in 3 (a), are also irreconcilable with that opinion since the U. S. Supreme

Court in the *Treichler* case, 338 U. S. at p. 254, ruled as follows:

> "It will be seen that as the taxing formula is reduced, the normal inheritance tax is no longer a factor in the computation."

(9965)

FILED
SEP 14 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 304

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF FRED A. MILLER, DECEASED,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin;
NEIL CONWAY,
Inheritance Tax Counsel of Wisconsin,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
The 30% Emergency Tax Calculation in the present computation avoids any measurement thereof by out-of-state property	4
Executor made no attack except upon the validity of the 30% Emergency Tax as applied to the entire amount of the Wisconsin Estate Tax	17
Executor is not entitled to challenge the validity of the Wisconsin Estate Tax	18
There is no violation of the equal protection clause	21
There is no impairment of or infringement of the Federal taxing power	22

Table of Cases Cited

Appeal of Van Dyke, 217 Wis. 528, 259 N. W. 700	19
Estate of Knowles, 295 Pa. 571, 145 Atl. 797, 63 A.L.R. 1086	19, 20
Frick v. *Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058	15
Goodland v. *Zimmerman*, 243 Wis. 549, 10 N. W. (2d) 180	19
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193	11, 13
Great Northern Ry. Co. v. *Washington*, 300 U. S. 154, 57 S. Ct. 398, 81 L. ed. 573	17
Hall v. *Geiger, Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 L. ed. 480	19
Henneford v. *Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814	19
Lagergren, Matter of, 276 N. Y. 184, 11 N. E. (2d) 722	12
Maxwell v. *Bugbee*, 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124	10, 12, 13, 14, 15, 16

Page

Meyer v. *Wells Fargo & Co.*, 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445 16
Monomotor Oil Co. v. *Johnson*, 292 U. S. 86, 54 S. Ct. 575, 78 L. ed. 1141 19
Opinion of the Justices, 85 N. H. 572, 154 Atl. 633 20
State ex rel. Kellog v. *Currens*, 111 Wis. 431, 87 N. W. 561 19
State of Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267 11
Treichler v. *Wisconsin*, 338 U. S. 251, 70 S. Ct. 1, 94 L. ed. 20 ..... 1, 2
Verheltz Construction Co. v. *Galles*, 204 Wis. 96, 235 N. W. 556 19
Wallace v. *Hines*, 253 U. S. 66, 40 S. Ct. 435, 64 L. ed. 782 16
Will of Kootz, 228 Wis. 306, 280 N. W. 672 20

STATUTES CITED

Wisconsin Statutes, Sections 72.50 to 72.61 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 304

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF FRED A. MILLER, DECEASED,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

This is an appeal by Oscar F. Treichler, as executor of the Will of Fred A. Miller, deceased, from a judgment of the Supreme Court of the State of Wisconsin determining the amount of Wisconsin inheritance taxes payable in the estate of said deceased, which was entered June 30, 1950 (not as yet reported) following the decision of the Supreme Court of the United States and its remand in *Treichler* v. *State of Wisconsin*, (Nov. 7, 1949) 338 U. S. 251, 70 S. Ct. 1, 94 L. ed. (adv. 20). A copy of said judgment here appealed from is attached to the Jurisdictional Statement of the Appellant and marked Appendix "A".

The decision of the Supreme Court of Wisconsin upon which said judgment was entered, after relating the prior appeal in *Treichler* v. *State of Wisconsin*, (Nov. 7, 1949) 338 U. S. 251, 70 S. Ct. 1, 94 L. Ed. (adv.) 20 and the reversal

with a remand for proceedings not inconsistent with the opinion, states:

> "We are of the opinion that the tax law must be construed, if possible, so as to be constitutional. As stated above, we sought in the former opinion to apply the law only to property in Wisconsin and thought we had succeeded. It has now been pointed out that the basis there used was so broad as to include property having a situs in other states. Neither misapplication of a law, nor the fact that it can be misapplied, renders it unconstitutional.
>
> "The legislature must have intended that the tax be computed only upon property having a situs within the state of Wisconsin.
>
> "The tax authorities have now recomputed the tax upon a base of eighty-seven per cent of the amount recaptured from the federal government, which clearly does not permit of a claim that Wisconsin is attempting to tax property which lies outside this state. We are therefore of the opinion that the state is entitled to the entry of judgment against the estate for the amount shown by the new computation of the Department of Taxation, [Such new computation is here set forth in the opinion by footnote 1. It is included in Appendix "A" attached to the Jurisdictional Statement of Appellant and is also set forth later in this Statement Opposing Jurisdiction.] and that when so entered it will not be inconsistent with the mandate of the United States Supreme Court referred to above."

This appeal involves the same facts and the same statutes which were before the Court in the previous case, *Treichler* v. *State of Wisconsin*, (Nov. 7, 1949) 338 U. S. 251, 70 S. Ct. 1, 94 L. Ed. (adv.) 20. As they were fully set forth therein, and particularly in the Brief of Appellee in that case, they need not be repeated here.

The Supreme Court of Wisconsin has now followed what it deems to be the proper application of the decision of the Supreme Court of the United States upon such prior appeal.

But, the Appellant is dissatisfied with the amount of the reduction in the taxes that results therefrom and seeks a further reduction in the Wisconsin death taxes payable in the involved estate by again appealing and making attacks thereon that are inconsistent with Appellant's position on such prior appeal or which were not there made, or both.

The position of the Appellee, State of Wisconsin, is that the present computation of the taxes, as ordered by the Supreme Court of Wisconsin in its decision and judgment here appealed from, meets all of the objections properly raised and is in full accord with the decision of the Supreme Court of the United States upon the prior appeal and the principles there set forth. The 30% emergency tax as calculated in the present computation is not measured in any part by property outside of Wisconsin. This is true because measurement of said 30% emergency tax by out-of-state property is wholly eliminated by deducting 12½% (the percentage of out-of-state property) from the 80% federal estate tax credit in calculating the amount of said 30% emergency tax upon the Wisconsin estate tax.

The prior computation of the inheritance taxes reviewed upon the previous appeal, was as follows:

(1) Wisconsin Normal Inheritance Taxes			$220,682.12
(2) Wisconsin Estate Tax:			
80% of U. S. estate tax		$630,709.62	
Less: (a) Wis. Normal Taxes	$220,682.12		
(b) Ill. Inheritance Taxes	35,616.26		
(c) Fla. Inheritance Taxes	21,709.45		
Total State Taxes		270,007.83	
Difference			352,701.79
(3) Wisconsin Emergency Tax:			
Wisconsin Normal Taxes	220,682.12		
30% additional tax thereon		66,204.65	
Wisconsin Estate Tax	352,701.79		
30% additional tax thereon		105,810.55	
Total 30% Emergency Tax			$172,015.20
Total Wisconsin Inheritance Taxes			$745,399.11

The computation set forth in the June 30, 1950 decision of the Supreme Court of Wisconsin is as follows:

(1) Wisconsin Normal Inheritance Taxes			$220,682.12
(2) Wisconsin Estate Tax:			
80% of U. S. Estate tax		$630,709.62	
Less: (a) Wis. Normal taxes	$220,682.12		
(b) Ill. inheritance taxes	35,616.26		
(c) Fla. inheritance taxes	21,709.45		
Total State Taxes		270,007.83	
Difference			352,701.79
(3) Wisconsin Emergency Tax:			
(a) Wisconsin Normal Inherit. Taxes		220,682.12	
30% additional tax thereon			66,204.64
(b) Wisconsin Estate Tax:		352,701.79	
80% of U. S. Estate Tax	630,709.62		
87½% ratio of Wis. Property to total estate	551,870.92		
U. S. Estate Tax Credit attributable to property outside Wisconsin	78,838.70		
Illinois Inheritance tax $35,616.26			
Florida Inheritance tax 21,709.45			
Out-of-state taxes deducted	57,325.71		
Wisconsin Estate Tax measured by property out of Wisconsin		21,512.99	
Wisconsin Estate Tax attributable to Wisconsin property		331,188.80	
30% additional tax thereon			99,356.64
Total Wisconsin Inheritance Taxes			$738,945.19

I. The 30% Emergency Tax Calculation in the Present Computation Avoids Any Measurement Thereof by Out-of-State Property.

At the outset it is to be noted that there is no question, and there can be none, as to the validity, or correctness of the calculation of the 30% emergency tax as applied to the Wisconsin "normal" inheritance taxes. It is for this reason that in showing the previous computation of the taxes at page 3 of this Statement (referred to in the prior

opinion of the Supreme Court of Wisconsin as "Table A") the 30% emergency tax on the Wisconsin "normal" taxes of $220,682.12 is shown separately from the calculation of the 30% emergency tax on the amount of the Wisconsin estate tax. In said prior calculation the amount of the Wisconsin "normal" taxes and the Wisconsin estate tax were lumped together and then the 30% tax was shown on the total of both taxes.

Likewise in the computation of the taxes now under attack the 30% emergency tax is calculated separately on the Wisconsin "normal" taxes and on the Wisconsin estate tax. Such separation more readily shows the elimination of any measurement of the 30% emergency tax by out-of-state property, as that is a matter which relates solely to and involves only the Wisconsin estate tax. It in no way concerns the calculation of the 30% emergency tax on or its application to the Wisconsin "normal" inheritance taxes.

Comparison of the two computations shows that the application of the 30% emergency tax to the Wisconsin estate tax in the present computation completely eliminates and avoids any measurement of the 30% tax by any out-of-state property. The objection raised by the executor was that application of the 30% emergency tax to the amount of the Wisconsin estate tax operated to measure such 30% tax to some extent by the property of the decedent which was situated outside of Wisconsin.

The point thus made, and as held by the Supreme Court of the United States upon the appeal, stems from the fact that the Wisconsin estate tax is computed in reference to the 80% federal basic estate tax credit. Such credit is on the entire amount of the federal basic estate tax, which tax is computed on property that is both within and without Wisconsin. Therefore, when the 30% emergency tax is applied to the entire amount of the Wisconsin estate tax it held that it transcends the constitutional limitations

upon the power of the State of Wisconsin to exact a tax to the extent that a part of the amount of the 30% emergency tax is thus measured by property outside of Wisconsin. The extent thereof is 30% on so much of the Wisconsin estate tax as reflects the use, in computing said estate tax, of that part of the 80% of federal tax credit which is attributable to the out-of-state property.

Accordingly the present computation eliminates from the amount of the Wisconsin estate tax upon which the 30% emergency tax is calculated, so much of the federal 80% tax credit referrable to out-of-state property as was not deducted out in the computation of the Wisconsin estate tax. This is done by first taking the amount of the federal estate tax credit of $630,709.62 and deducting therefrom the amount thereof attributable to Wisconsin property, or 87½%, which is $551,870.92. This leaves $78,838.70 as the 12½% of the federal estate tax credit which is referrable to property outside Wisconsin.

But, in computing the Wisconsin estate tax there has been a deduction in respect to this 12½% of the federal estate tax that is deemed attributable to out-of-state property. The inheritance taxes which were paid to the states of Illinois and Florida, $35,616.26 and $21,709.45 respectively, totalling $57,325.71 were deducted. Very clearly the deduction of that amount operates to reduce the amount of the federal estate tax credit that is deemed attributable to the property in said state. It is that property upon which said Illinois and Florida taxes were paid.

However, the deduction of this $57,325.71 is not equal to the full 12½% of the federal estate tax credit deemed attributable to such property in Illinois and Florida. It falls short thereof by $21,512.99. Thus, this is the amount or extent to which no allowance or deduction is made for that part of the federal estate tax credit which is attrib-

utable to out-of-state property. It follows then that the amount of the Wisconsin estate tax upon which the 30% emergency tax is computed must be reduced by this amount of $21,512.99 when calculating the 30% emergency tax, if the latter is not deemed to be computed on a part of the Wisconsin estate tax that may be said to be referrable to out-of-state property and if the 30% emergency tax upon the Wisconsin estate tax is not deemed to be measured in part by out-of-state property.

When this $21,512.99 is deducted from the Wisconsin estate tax of $352,701.79 there has been eliminated from the amount of the Wisconsin estate tax the entire $78,838.70, which is the 12½% of the federal estate tax that is deemed attributable to the out-of-state property. Accordingly when that total amount has been deducted so as to reduce the Wisconsin estate tax to the full extent thereof, full allowance has been made for the proportionate part of the federal tax credit which is referrable or attributable to out-of-state property and the extent to which the portion so attributable entered into the computation of the Wisconsin estate tax has been entirely removed.

The resultant 30% emergency tax of $99,356.64 is thus not measured in any way by property outside of Wisconsin because it is calculated only on so much of the Wisconsin estate tax as is not referrable in any way to property outside the state, that is, solely upon the portion of the Wisconsin estate tax that is referrable to Wisconsin property.

The same result would be reached if 87½% of the federal estate tax credit were used, or $581,870.92, and the Wisconsin "normal" inheritance taxes of $220,682.12 were deducted therefrom. The portion of the Wisconsin estate tax referrable to Wisconsin property would be the remainder or $331,188.80. Then the 30% emergency tax applied thereto produces a tax of $99,356.64, the same as in the computation in the State's motion. This is just another

method of limiting the 30% emergency tax to that amount of the Wisconsin estate tax which is solely attributable to Wisconsin property.

As so calculated the 30% emergency tax on the Wisconsin estate tax is clearly within constitutional bounds. It is readily apparent. Assume the situation were such that the amounts of the inheritance taxes paid to Illinois and Florida exceed 12½% of the amount of the federal 80% tax credit. In such a case there could not be any claim that the 30% emergency tax on the Wisconsin estate tax is measured in any way by property outside the state.

It so happens that the Florida tax is computed at the percentage of the 80% federal tax credit which the Florida property is of the entire property of the estate. The Florida tax is laid and computed in those terms. Assume that the Illinois tax was computed on the same basis or as laid it did in fact equal or exceed the percentage of the 80% federal credit which the Illinois property bears to the property of the estate everywhere. The total of the Florida and Illinois taxes would then equal or exceed the $78,387.70, which is the 12½% of the federal estate tax credit, and that amount would have been deducted in computing the Wisconsin estate tax. Then very clearly the Wisconsin estate tax would in no way be deemed computed in reference to any property outside of Wisconsin. The 30% emergency tax applied then to such Wisconsin estate tax would clearly be valid because it is in no wise measured by out-of-state property.

In such assumed case if the Illinois tax were computed like the Florida tax, or equalled the Illinois property percentage of 80% federal tax credit, the Illinois tax would then be $43,222.44. Adding the Florida tax of $35,616.26 thereto would amount to $78,838.70. If that total were deducted along with the Wisconsin "normal" taxes the

Wisconsin estate tax would be $331,188.80 in such assumed case. The 30% emergency tax computed on that amount would be clearly valid because the Wisconsin estate tax would be reduced by the full portion of the federal estate tax credit that is referrable to out-of-state property.

The foregoing demonstrates that the 30% emergency tax as calculated in the State's motion eliminates any and all measurement thereof by out-of-state property and therefore is beyond attack.

Appellant, however, contends that such 30% emergency tax as so calculated still taxes out-of-state property. He points out that the estate subjected to the federal basic estate tax, being composed of both the Wisconsin property and the out-of-state property, necessarily falls into higher brackets than it would if composed only of the Wisconsin property. Therefore because of the progressive rates of the federal basic estate tax the amount of the federal basic estate tax attributed to the property in Wisconsin, using the ratio that the Wisconsin property bears to the total property, is larger than the federal basic estate tax would be if computed solely upon the Wisconsin property. Appellant therefore argues that the attributing of 87½% of the 80% of federal estate tax credit to the Wisconsin property does not eliminate the influence of the out-of-state property in enhancing the size of the 80% credit. From this it is claimed that the 30% emergency tax is thus still measured by out-of-state property in a way that the Supreme Court of the United States held to be invalid.

In the first place, Appellant's contention completely overlooks the fact that the federal basic estate tax is one indivisible tax and all of the property which the decedent owned at his death, both within the State of Wisconsin and outside the state, contributed to cause the amount of said federal estate tax. It is obvious that in the absence of the

out-of-state property the federal basic estate tax and the 80% credit thereon would both be lower than where the estate is composed of both the property within the state and that without it. But the Wisconsin property contributed proportionately to causing the federal estate tax and the 80% credit thereon in the same way that the out-of-state property contributed proportionately thereto. It cannot be said that the out-of-state property was the property of the estate that fell in the higher brackets nor can it conversely be said that it was the Wisconsin property that fell in the higher brackets. Both of the properties added together exerted a common influence on the amount of the federal basic estate tax in all the brackets. If 87½% of the property which caused the federal estate tax, and the 80% credit thereon, was Wisconsin property, then that property caused 87½% of the amount of the federal estate tax and likewise 87½% of the 80% credit thereon.

Such apportionment of the impact of the properties on a prorata basis is fair and equitable and the use of that part of the 80% federal estate tax credit in computing the 30% emergency tax does not result in measuring the 30% emergency tax by the out-of-state property. On the contrary it measures the 30% emergency tax on the fair proportion of the 80% credit that is attributable to the Wisconsin property.

In the second place, if the use of such proportionate part of the 80% federal tax credit is a measurement of the 30% emergency tax in some part by the out-of-state property because of the aggregate estate falling into the higher bracket, it is a measurement of a type that has been clearly held to be valid by the United States Supreme Court.

Maxwell v. *Bugbee* (1919), 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124;

Great Atlantic & Pacific Tea Co. v. *Grosjean* (1937), 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193;
State of Wisconsin v. *J. C. Penney Co.* (1940), 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267.

These cases recognize the well established rule that the rating of a tax by factors outside of the state does not make the tax invalid as a tax upon property outside of the state.

The case of *Maxwell* v. *Bugbee* is a direct parallel to the instant case. The amount of the New Jersey inheritance tax was enhanced by virtue of the influence of the out-of-state property because of the graduated rates that were higher in the upper brackets. That is exactly the situation here as respects the federal basic estate tax and the 80% credit thereon. The Court there sustained as valid the New Jersey inheritance tax law which provided that where a nonresident decedent owned property in the state of New Jersey and also property outside of the state, all of the property should be lumped together and a tax computed on the entire estate as though it were all a New Jersey estate and the property all located in that state; and then the tax on the property in the state of New Jersey should be the proportionate part of such total tax as the New Jersey property bore to the total property. Use of the total estate brought it into the higher brackets with the result that the New Jersey tax on the New Jersey property in the estate would be higher than if computed on the New Jersey property alone.

As stated by the Court the complaint there was that the effect of including the property beyond the jurisdiction of the state in thus measuring the tax amounted to a deprivation of property without due process of law because it in effect

taxed property outside the state of New Jersey. In sustaining the New Jersey statute the Court said:

> "• • • When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 232. After deciding that the privilege tax, there involved, did not impose a burden upon interstate commerce, this court held that it was not in substance and effect a tax upon property beyond the State's jurisdiction, although a large amount of the property, which was referred to as a measure of the assessment, was situated outside of the State. In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void." (pp. 539.)

In the case of *Matter of Lagergren* (1937), 276 N. Y. 184, 11 N. E. (2) 722, the New York court passed upon a statute of the same design as the New Jersey statute in *Maxwell* v. *Bugbee* (1919), 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124. In upholding the tax so computed reliance was placed

upon *Maxwell* v. *Bugbee* and *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937), 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193.

In the case of *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937), 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, a Louisiana occupational tax on retail chain stores was sustained where the amount of tax per store in Louisiana was based upon the total number of chain stores operated by the Company both in and out of the state. The rate of tax per store increased progressively as the total number of stores increased, varying from $10 per store where the total number of stores everywhere was not more than 10 to $500 per store where the total number of stores everywhere was more than 500. Thus, the amount of the tax for each of the chain stores in Louisiana depended entirely upon how many stores the company operated everywhere and not just the number operated in Louisiana. The tax payable by each of the stores in Louisiana was influenced and determined by the total number of stores that the company had outside of the state of Louisiana. It was held that this measuring of the tax was not in legal effect the taxation of property beyond the borders of the state and the case of *Maxwell* v. *Bugbee* (1919), 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124, was cited with approval, with a statement that it went far to sustain the validity of said Louisiana chain store tax.

It is thus submitted that if the computation of the 30% emergency tax set forth in the present computation is a measurement of that tax by the use of out-of-state property solely because of the estate falling into the higher brackets of the federal estate tax, such measurement is of a type or kind that is not improper and does not give the tax so computed the effect of an imposition on the out-of-state property.

Finally, when the Court in its decision in the instant case said that the 30% emergency tax is invalid insofar as it is measured by tangible property outside Wisconsin it was not referring to the type or kind of measurement resulting from an apportionment of a tax that was higher due to the impact of progressive rates. It merely stated that the computation of the Wisconsin emergency tax that was before it was invalid because the Court determined that it was measured by tangible property outside Wisconsin. The statement of the Court must be read in light of its entire opinion.

It did however expressly indicate that trouble with the application of 30% emergency tax in that computation was

> "• • • it did not apportion that 80% [of the federal estate tax credit] to property within the state • • •."

In the body of the opinion no mention is made of the proportionate calculation of a tax of the type that is involved here and which had been approved and upheld by Court in the case of *Maxwell* v. *Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124. No mention is made of the case of *Maxwell* v. *Bugbee*, notwithstanding that the State in its brief before the Supreme Court of the United States expressly called that case to the Court's attention. At page 27 of the State's brief appeared the following:

> "• • • It is well established that a state tax may be measured by property, events or action which have a location outside of the state and that such rating of the tax by such outside factors does not make the tax invalid as extraterritorial. *Maxwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124; *Great Atlantic & Pacific Tea Co. v. Grosjean*, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193; *State of Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267. • • •"

It seems clear that the Court thus did not in any way overrule *Maxwell* v. *Bugbee,* (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124, or make any decision inconsistent therewith. Had the court been of that mind it surely would have mentioned the *Maxwell* v. *Bugbee* case. It did not do so. But it did in footnote No. 3 to the opinion state that a different question might be presented, however, if the tax were computed beginning with 87.52% rather than all of the 80% federal credit and that it intended to intimate no opinion as to such situation. Were the Court not cognizant of the rule in *Maxwell* v. *Bugbee,* (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124 and intending in no way to impair the force of that decision, there would then have been no point in the footnote.

That such is the effect of the decision is further evidenced by the fact that in discussing the case of *Frick* v. *Pennsylvania,* (1925) 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058, and the instant case, the Court said:

> "• • • It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction."

In the present computation it is necessary to know what property is located within the State of Wisconsin in order to compute the 30% emergency tax, for it is used as the factor in determining the amount of the 80% federal estate tax credit that is attributed to the Wisconsin property as the base in respect to which the 30% emergency tax is calculated.

What the Court said in the last paragraph of the opinion is that the 30% emergency tax as previously calculated is invalid to the extent that it there found the same to be a tax upon tangible property outside Wisconsin. It did not and cannot be taken to have held other than that the 30% emergency tax as there calculated was invalid because it

was thus measured by tangible property outside Wisconsin. It did not say and cannot be read as intending to state that admeasurement of a tax upon a proportionate basis of the type set forth and approved in *Maxwell* v. *Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124, would be an invalid tax.

The cases cited by Appellant are not in point. In *Meyer* v. *Wells Fargo & Co.*, (1912) 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445, a state tax levied upon corporations doing business both within and without the state was expressly calculated upon the percentage of gross receipts from everywhere that business done within the state bears to total business. The receipts of the plaintiff corporation were largely from interstate commerce and it also received large sums as income from investments in bonds and land all outside of the state. The attempted apportionment which was express in the statute was obviously unfair because it attempted to ascribe to the State of Oklahoma a portion of the gross receipts that had no bearing upon or relationship to business done in Oklahoma. The statute could not be limited and applied just to gross receipts from business done in Oklahoma and thus properly attributable to that state, for the very good reason that the very language of the statute expressly imposed the tax in terms of a percentage of total gross receipts from everywhere.

Wallace v. *Hines*, (1920) 253 U. S. 66, 40 S. Ct. 435, 64 L. ed. 782 was a case of state taxation of railroad property at the proportion of its total property everywhere that the mileage in the state bore to total mileage everywhere. The Court there merely hold that mileage is not a fair or just basis for allocation of system value where it was shown that the mileage cost of construction of the railroad in North Dakota was less than in other states and that all of the railroad's terminal properties were in the other states.

The quotation from *Great Northern Ry. Co.* v. *Washington*, (1937) 300 U. S. 154, 57 S. Ct. 398, 81 L. ed. 573, was not made in reference to a tax. What was there involved was an inspection fee of 1/10 of 1% of gross operating revenue which was found to be unreasonable and disproportionate to the services for which it was imposed and therefore excessive.

II. Executor Made No Attack Except upon the Validity of the 30% Emergency Tax as Applied to the Entire Amount of the Wisconsin Estate Tax.

The only challenge which the executor made before the Supreme Court of Wisconsin upon the appeal to that Court in this matter was as to the constitutionality of the 30% emergency tax as computed upon the Wisconsin estate tax. There was no attack upon the "normal" taxes or the 30% tax computed on the amount of the "normal" taxes. Nor was there any attack by the executor upon the constitutionality of the Wisconsin estate tax.

The sole argument as respects the Wisconsin estate tax was as to the interpretation of the statute imposing it and then only as to how the tax is to be computed. The Supreme Court of Wisconsin ruled upon that question and held that the Wisconsin estate tax is computed before the 30% emergency tax.

It is true that the Executor did urge as an interpretative argument that the Wisconsin estate tax statute should be construed in the manner that the Executor maintained and that if not so construed then the effect of application of the 30% emergency tax thereto would make the 30% emergency tax operate as a tax measured by out-of-state property. But that is not an attack on the validity of the Wisconsin estate tax as interpreted and applied by the Supreme Court of Wisconsin in its prior decision in this case. It is solely

an attack on the validity of that part of the 30% emergency tax which is deemed measured by out-of-state property and nothing more.

But, upon the motions for judgment in the Supreme Court of Wisconsin following the remand from the Supreme Court of the United States, the executor then did an "about face." He had argued upon the appeal to the Supreme Court of the United States that the 30% emergency tax as then computed on the Wisconsin Estate Tax (the only matter there under attack being the 30% emergency tax which likewise was the sole matter challenged as to constitutionality by the executor upon the appeal to the Supreme Court of Wisconsin) was invalid because it was not computed upon the part of the Wisconsin estate arrived at by apportioning the federal estate tax credit upon the basis of the percentage of the Wisconsin property, namely 87½%, to the entire property. Notwithstanding, that such was his argument there and that he did not challenge the Wisconsin estate tax, he argued upon said motion after remand, and for the first time, that computation of the 30% emergency tax as set out in the present computation still is a tax on out-of-state property because of the progressive rate factor and also that the Wisconsin estate tax is invalid because not computed on an apportionment of the federal estate tax credit.

III. Executor Is Not Entitled to Challenge the Validity of the Wisconsin Estate Tax

It is well recognized that a litigant may not assert any rights except his own and may not challenge the validity or constitutionality of a statute unless, and only when, he is harmed or injured thereby. Nevertheless the appellant executor attempts to assert invalidity of the Wisconsin estate tax.

The appellant executor has recognized that such prin-

ciples preclude any challenge being made by him as to the validity or constitutionality of Sections 72.50 to 72.61, Wis. Stats., which impose the Wisconsin estate tax. In his Respondent's Brief filed with the Supreme Court of Wisconsin upon the appeal to that court in this matter there is an express reference to *Estate of Knowles,* (1929) 295 Pa. 571, 145 Atl. 797, 63 A. L. R. 1086 and a short discussion wherein it is conceded that the appellant may not challenge the Wisconsin estate tax because the estate can suffer no injury thereby. The estate pays the same amount whether to the federal government because the total of the state taxes do not take up the full 80% credit or to the state for an estate tax which takes up the difference otherwise payable as a federal tax.

The fundamental proposition that a litigant is a champion of no rights except his own and that he may not challenge the validity or constitutionality of a statute unless he is harmed or injured thereby is well established and recognized.

Henneford v. *Silas Mason Co.,* (1937) 300 U. S. 577, 583, 57 S. Ct. 524, 81 L. Ed. 814;

Monomotor Oil Co. v. *Johnson,* (1933) 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141;

Hall v. *Geiger Jones Co.,* (1916) 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480;

State ex rel. Kellog v. *Currens,* (1901) 111 Wis. 431, 87 N. W. 561;

Verheltz Construction Co. v. *Galles,* (1931) 204 Wis. 96, 235 N. W. 556;

Goodland v. *Zimmerman,* (1943) 243 Wis. 549, 10 N. W. (2) 180;

Appeal of Van Dyke, (1935) 217 Wis. 528, 259 N. W. 700.

It is equally well settled that amicus curiae has no standing to raise a question which the party to the case has not

raised or is not in a position to raise. *Will of Kootz*, (1938) 228 Wis. 306, 313, 280 N. W. 672.

In two cases it has been expressly held that the above principles are applicable to a state inheritance tax of the same design and operation as the Wisconsin estate tax. *Estate of Knowles*, (1929) 295 Pa. 571, 145 Atl. 797, 63 A. L. R. 1086; *Opinion of the Justices*, (1931) 85 N. H. 572, 154 Atl. 633. These two cases stand squarely against either the respondent executor or amicus curiae raising any question in this case as to the constitutionality of the Wisconsin estate tax. Accordingly the attempt to here challenge the constitutionality of the Wisconsin estate tax is fruitless and that question is not before the Court.

Some point is made by the appellant that the Supreme Court of the United States said that the Wisconsin estate tax was not there under "explicit attack." All that the Court meant by using that phrase was that the respondent did not there make any direct challenge against the validity of the Wisconsin estate tax, but that the challenge was against the computation of the 30% emergency tax as applied to the Wisconsin estate tax with the result that as so computed initially the 30% emergency tax on the estate tax did have the effect of measuring the 30% emergency tax invalidly by property outside the state. There can be no question but that the executor did not in any way challenge the validity of the Wisconsin estate tax in the Supreme Court of Wisconsin. Likewise there can be no question but that it did not challenge the validity of the Wisconsin estate tax in the prior hearing in the Supreme Court of the United States.

The Court stated the issue as follows:

> "The only statute, the validity of which is involved in this appeal, is § 72.74(2) of the Wisconsin statutes

known as the Emergency Tax on Inheritances. * * *"

IV. There Is No Violation of the Equal Protection Clause

Even if the appellant executor were entitled to raise the objection at this time, which he is not entitled to do, the argument that the present computation is discriminatory in violation of the equal protection clause of the 14th Amendment is without merit. The tables set forth at page 7 of appellant's Jurisdictional Statement are purely hypothetical and do not present either the situation in the instant case or the true picture generally.

It would appear from such tables that there would be a difference in the amount of taxes. If such disparity would arise it is not an unlawful discrimination. It would arise not because of the state law but solely from the fact that the rates of the federal estate tax are progressively higher in the upper brackets. Furthermore, two estates of different total size but with the same amount of property in Wisconsin are not similarly situated. They are different estates subject to a different amount of federal taxes, which difference comes about from the federal tax law and its pattern and provisions.

As previously pointed out if the taxes levied by Illinois and Florida totalled the percentage of the 80% federal tax credit that the total Illinois and Florida property bears to the total property of the estate, the Wisconsin estate tax would be the $331,188.80, which is the figure used in the present computation of the 30% emergency tax on the Wisconsin estate tax. This figure is 87½% of the federal tax credit of $630,709.92 which is $551,870.92, less the Wisconsin "normal" taxes of $220,682.12. While the federal estate tax credit of $630,709.92 is larger than the federal estate tax credit would be if the entire estate were solely the $6,869,778 (the amount of the Wisconsin property) and

it were all in Wisconsin, in that event it would all be referrable to Wisconsin property. The difference however comes about because of the progression of the federal estate tax rates.

Thus, appellant's argument relative to discrimination and denial of equal protection as respects the 30% emergency tax, and grounded on the hypothetical tables, is not actually an equal protection argument at all but just another way of trying to assert under the guise thereof the fallacious and unsupportable proposition that the 30% emergency tax must be limited to computation upon the amount that the 80% federal estate tax credit would be if the estate consisted solely of the Wisconsin property and it were all in Wisconsin, otherwise there is extraterritorial taxation. That position is without merit and is dealt with previously in the discussion of the impact of the progressive rate at pages 9 to 17 thereof.

Similarly, any difference between the Wisconsin estate tax and what it would be if all of the property of the estate were in Wisconsin and the amount thereof was the amount of the Wisconsin property, arises, so far as any discrimination is concerned, out of the provisions of the federal statute permitting the reduction of the federal tax up to the 80% and the progression in the rates. But, as previously pointed out, the appellant is in no way injured or harmed by any such disparity because so far as the federal estate tax and Wisconsin estate tax are concerned, the estate pays the same total amount in any event. There is thus no unlawful discrimination which constitutes a lack of equal protection for in order to exist there must be some injury or harm.

V. There Is No Impairment of or Infringement of the Federal Taxing Power

The assertion that the present tax computation here involved operates to impair the federal taxing power is but

"grasping at straws". It is wholly lacking in merit. The matter of the allowance of credit upon the federal tax up to 80% thereof for state taxes paid is pursuant to express congressional action. It is something solely within the domain of Congress and the federal tax authorities. If Congress wishes it may change its enactment. Nothing in this state tax law or its application purports to or operates as any attempt to preclude it. The federal tax authorities are not here complaining. This assertion by appellant is an excellent illustration of the reason for the rule that one may not champion any rights except his own or challenge the constitutionality of a law except where he is injured thereby.

The foregoing shows that no substantial federal question is here presented and that the present computation of the Wisconsin inheritance taxes is in accord with applicable legal principles and the decision of the Supreme Court of the United States upon the prior appeal.

Respectfully submitted,

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin;

HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin;

NEIL CONWAY,
Inheritance Tax Counsel of Wisconsin,
Counsel for Appellee, State of Wisconsin.

P. O. Address:
State Capitol,
Madison 2, Wisconsin.

FILED
SEP 14 1960
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 304

OSCAR F. TREICHLER, Executor of the Estate of Fred A. Miller, Deceased,

Appellant,

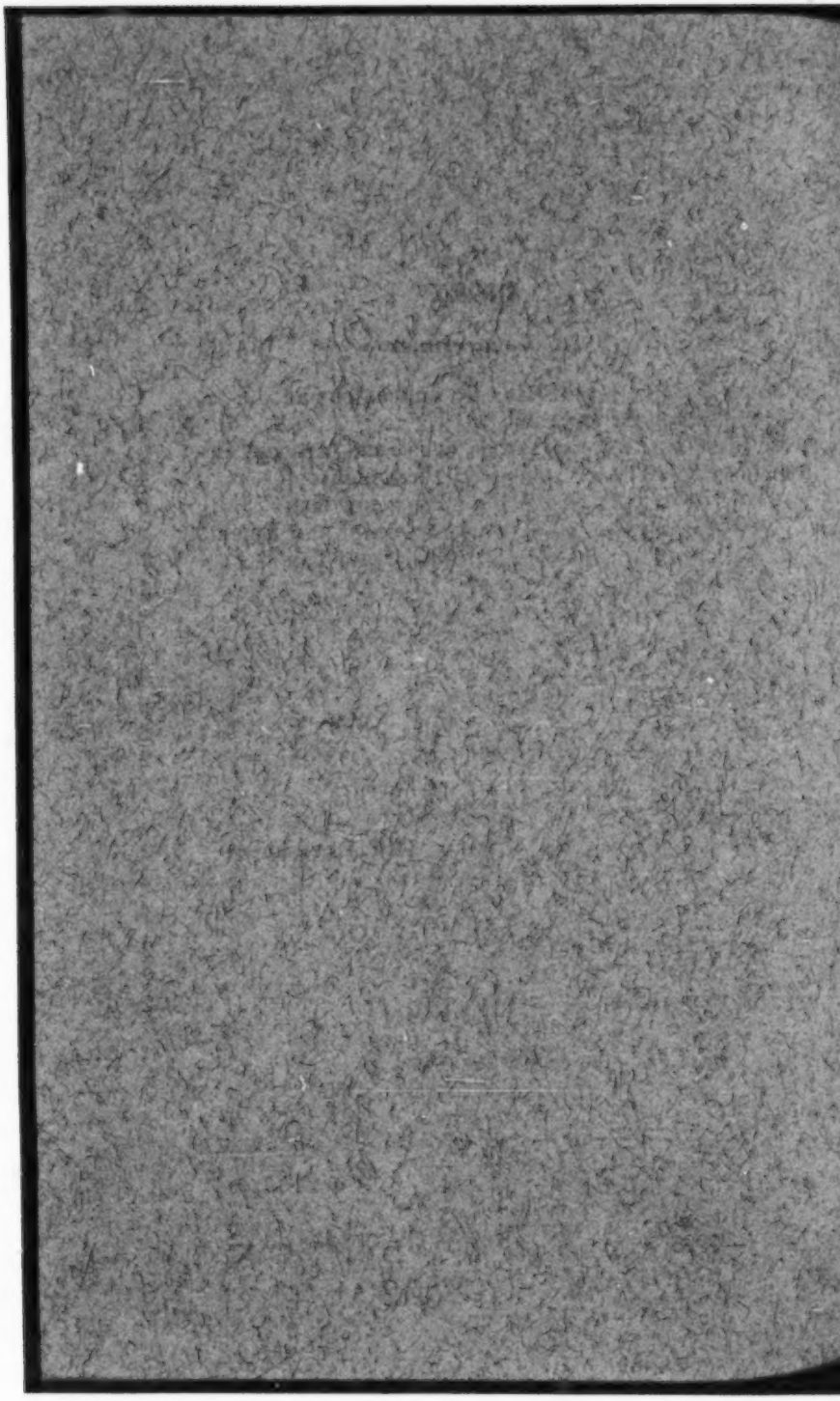
vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION BY AMICUS CURIAE

J. Gilbert Hargrove,
Attorney and Amicus Curiae.



INDEX

Subject Index

	Page
Statement as to jurisdiction by amicus curiae	1
Statement of the case	1
These tax statutes, as so construed, are not in conformity with this Court's mandate	4
The recomputation of the Emergency Tax	5
Effect of the present construction of the Emergency Tax on the Wisconsin Estate Tax	7
Conclusion	11

Table of Cases Cited

Frick v. *Pennsylvania*, 268 U. S. 473	6
Maxwell v. *Bugbee*, 250 U. S. 525	6
Opinion of the Justices, 154 Atl. 633	3
Treichler v. *Wisconsin*, 338 U. S. 251	2

Statutes Cited

Constitution of the United States, 14th Amendment	2
Internal Revenue Code, Section 813(b)	2
Wisconsin Statutes:	
Section 72.01 to 72.24	2
Sections 72.50 to 72.61	2
Section 72.74	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 304

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT RE JURISDICTION BY AMICUS CURIAE

The facts of this case, the prior proceedings herein, and the Wisconsin Statutes involved, have previously been presented to this Court and are fully set forth in the Appellant's Jurisdictional Statement. These matters are, therefore, only briefly mentioned herein.

The purpose of this Statement re Jurisdiction by *Amicus Curiae* is to outline generally the undersigned's reasons

for considering that the decision on remand of the Supreme Court of Wisconsin was not in conformity with this Court's mandate, and that this Court should take jurisdiction to review that decision. Only the question arising under the due process clause of the Fourteenth Amendment to the Constitution of the United States is here discussed. Other constitutional questions exist in the case, and are fully discussed in the Appellant's Jurisdictional Statement.

The previous appeal to this Court (October Term, 1948, No. 547) involved the joint application of three Wisconsin tax statutes which shall hereinafter be referred to as follows: Sections 72.01 to 72.24 as "The Normal Tax"; Sections 72.50 to 72.61 as "The Wisconsin Estate Tax"; and Section 72.74 as "The Emergency Tax". A summary of these tax statutes, described in the light of developments since the prior appeal to this Court, is presented in the paragraphs following.

1. The Statutes Involved

The *Normal Tax* is a graduated inheritance tax which only indirectly affects the issues here involved. This was recognized by this Court in its prior opinion, *Treichler* v. *Wisconsin*, 338 U. S. (Advance Sheets) 251, 254 (1949) where it is stated:

> "It will be seen that as the taxing formula is reduced, the normal inheritance tax is no longer a factor in the computation."

Such is still the case at this stage of the proceedings, and the Normal Tax is not under attack.

The *Wisconsin Estate Tax* was designed as a device whereby the State might obtain for itself the full benefit of the 80% credit against the federal basic estate tax allowed by Section 813(b) of the Internal Revenue Code. It provides that it shall be equal to the amount, if any, by

which the federal 80% credit exceeds "the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent." Its original effect, therefore, was to cause such estates as the *Miller* estate to pay a minimum aggregate Wisconsin tax exactly equal to the federal 80% credit, less any death taxes paid to other states. From the outset, it has been argued by the Appellant herein that this tax is inherently unconstitutional, since the minimum tax which it imposes is measured by the decedent's federal estate which may contain property both within and without the jurisdiction of Wisconsin. However, in the original assignment of error to this Court, the Wisconsin Estate Tax was not explicitly attacked for the reason that it was then contended that the Emergency Tax was unconstitutional in its entirety. Had this contention prevailed, the Wisconsin Estate Tax would have had only its original effect, the tax burden of the estate would not have been increased by its enactment, and the situation would have been the same as in *Opinion of the Justices*, 154 Atl. 633 (N. H., 1931) where the prototype of the Wisconsin Estate Tax Law was held valid so long as it did not increase the overall tax burden of an estate. The decision of this Court in *Treichler* v. *Wisconsin, supra*, together with the decision of the Wisconsin Supreme Court on remand, have now, however, disposed of this contention that the Emergency Tax is unconstitutional in its entirety and have thereby raised the same constitutional issue with respect to the Wisconsin Estate Tax which was originally presented with respect to the Emergency Tax.

The *Emergency Tax* is a surtax, imposed at the rate of 30% on the aggregate of all other Wisconsin death taxes paid by an estate. Prior to the decision on remand in

this case, the Emergency Tax was applied in estates such as this, so that it equaled 30% of the difference between the federal 80% credit and the death taxes paid to states other than Wisconsin. So applied it was declared invalid by this Court in *Treichler* v. *Wisconsin, supra.* Therefore, on remand, the Wisconsin Supreme Court in effect amended the Emergency Tax by judicially writing into it what purports to be an apportionment formula. As so amended, the Emergency Tax now equals 30% of the Normal Tax, plus 30% of a hypothetical "Wisconsin Estate Tax", which is computed by taking the actual Wisconsin Estate Tax and deducting therefrom the difference between (a) a percentage of the 80% credit equal to the percentage of out-of-state property in the decedent's estate, and (b) any foreign state death duties paid by the estate. The only effect of this rather complex formula, in the case at bar, has been to reduce the Emergency Tax by the relatively insignificant amount of $6,453.92 out of the total of $172,015.20 which was previously assessed. *The Wisconsin Estate Tax, however, is still levied in the same amount as before.*

2. These Tax Statutes, as so Construed, Are Not in Conformity With This Court's Mandate

It seems manifest that two requirements were imposed upon the Wisconsin Supreme Court by this Court's mandate: *First,* to construe or otherwise dispose of the Emergency Tax so as to remove from it all consequences of its previous measurement by out-of-state property; and, *second,* in so doing, to avoid raising on the facts a similar constitutional question with respect to the Wisconsin Estate Tax or any other related tax. It is respectfully submitted that the decision of the Wisconsin Supreme Court, on remand, failed in both these requirements. As now construed,

the Emergency Tax has been merely edged in the direction of constitutionality, without the consequences of its measurement by out-of-state property having been eliminated; and, at the same time, the changes effected in the Emergency Tax have now caused the Wisconsin Estate Tax to work an actual deprivation of property without due process of law under the rule of *Treichler* v. *Wisconsin, supra.* The effect of the Wisconsin Supreme Court's decision, on remand, in both these respects, is discussed in detail below.

3. The Recomputation of the Emergency Tax

The State's formula for recomputation of the Emergency Tax, which was accepted substantially without discussion by the Wisconsin Supreme Court, has already been stated verbally above. In tabular form, as applied to the figures of the Miller Estate, it is as follows:

(a) Emergency Tax on the Normal Tax			
The Normal Tax		220,682.12	
Emergency Tax thereon			66,204.64
(b) Emergency Tax on the Wisconsin Estate Tax			
The Wisconsin Estate Tax		352,701.79	
80% Credit	630,709.62		
87½% of 80% Credit	551,870.92		
Difference	78,838.70		
Illinois Inheritance Tax. 35,615.26			
Florida Inheritance Tax. 21,709.45			
Out-of-State Taxes	57,325.71		
Difference		21,512.99	
Difference (Hypothetical "Estate Tax")		331,188.80	
Emergency Tax on Hypothetical Estate Tax			99,356.64
Total Emergency Tax			165,561.28

Since the amount of the Emergency Tax as previously computed was $172,015.20, this recomputation represents a total reduction of $6,453.92, or 3.75% of the amount of the Emergency Tax as previously computed. Against this stand the facts: (1) that the Miller Estate had 12½% of

its property outside the taxing jurisdiction of Wisconsin, and (2) that, if it had not owned any of this out-of-state property, its Emergency Tax, under both the old and the new computation, would have been only $151,911.88. An analysis of the table set forth above makes it clear that this discrepancy is not the result of any attempt to "rate" the Emergency Tax in accordance with the decedent's entire estate under the rule of *Maxwell* v. *Bugbee*, 250 U. S. 525 (1919). This case was explained and distinguished in *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925). It held that although a state tax may not be measured by out-of-state tangible property, it may be "rated" by such property. Its rule does not apply in this situation for three reasons: (1) The Emergency Tax continues to be *measured* and not *rated* by out-of-state property, its 30% rate being constant in all cases; (2) Although the federal basic tax, which is the measure of the Emergency Tax, is both *rated* and *measured* by the decedent's federal estate, these two aspects of the federal tax are inextricably mixed in their effect on the Emergency Tax; and in any event it is the rate of the *Emergency Tax* itself, and it only, which is subject to adjustment under the *Maxwell* rule; and (3) The out-of-state taxes, which this Court has held have no necessary relation to the Wisconsin Estate, are used to diminish, and in some cases to nullify, the adjustment which *is* made in the measure of the Emergency Tax.

Therefore, as recomputed in the decision of the Wisconsin Supreme Court on remand, the Emergency Tax is still measured in part by out-of-state property. Moreover, even the slight adjustment which is made in its amount is uncertain, for if the out-of-state property of an estate were located in a jurisdiction which imposed a tax thereon in excess of the reduction now applied to the 80% credit (as if, in the Miller Estate, the Florida and Illinois

taxes had totalled $78,838.70 rather than $57,325.71), the Emergency Tax would be the same as before and would still equal exactly 30% of the difference between the 80% credit and the other taxes paid to other states. It is therefore respectfully submitted that the Emergency Tax, as now construed, still presents substantially the same constitutional question that it presented on the original appeal in this case.

4. Effect of the Present Construction of the Emergency Tax on the Wisconsin Estate Tax

From the outset, it was maintained by the Appellant, and argued at all stages, that the Wisconsin Estate Tax is potentially unconstitutional, being measured, not by a decedent's Wisconsin estate alone, but by the federal basic tax, which in turn is measured by all his property wherever situated. The fact that the Wisconsin Estate Tax is in part measured by out-of-state property is expressly recognized by the Supreme Court of Wisconsin, in its opinion on remand, where, in Section 3 (b) of the table attached thereto, the amount of $21,512.90 is described as "Wisconsin Estate Tax measured by property out of Wisconsin". This amount is included, without diminishment, in the $352,701.79 of Wisconsin Estate Tax computed by Section (2) of that table, and is still levied against the estate.

Moreover, there could at this stage be no serious dispute of this conclusion. The determination of this Court that the Emergency Tax was measured in part by out-of-state property was based precisely upon the fact that the Emergency Tax equaled 30% of the minimum tax determined by the Wisconsin Estate Tax. This being so, this minimum tax, which still is levied in the amount of 80% of the federal basic tax, less any taxes paid to other states, must be equally measured by out-of-state property.

It being conceded that the Wisconsin Estate Tax is measured in part by out-of-state property, the only possible qualification with respect to its unconstitutionality in this case was that, *in the absence of the Emergency Tax,* it did not increase the over-all tax burden of the estate. But developments since the original appeal to this Court have now rendered even this qualification inoperative on the facts. These developments are as follows:

In the first place, this Court, in *Treichler* v. *Wisconsin, supra,* declared that the Emergency Tax was not necessarily invalid in its entirety. In the second place, the Wisconsin Supreme Court, on remand, made two further determinations: (1) It indicated that it will save whatever can be saved of the Emergency Tax, and that any portion so saved will still be disallowed as a deduction in computing the Wisconsin Estate Tax; (2) it then separated the Emergency Tax into two parts, one being measured by the Normal Tax and the other being measured by the hypothetical "Wisconsin Estate Tax" referred to above. This separation of the Emergency Tax is particularly significant, since that part of it which is measured by the Normal Tax is unaffected by out-of-state property, and hence is unassailable in any tribunal beyond the Wisconsin court.

The fact has now emerged, therefore, that there will in all events be some valid substantial residuum of the Emergency Tax which will be levied against the estates of Wisconsin decedents and which will *not* be deductible in computing the Wisconsin Estate Tax. This fact, in turn, has determined that the Wisconsin Estate Tax will not merely increase the aggregate taxes to the point where they equal the federal 80% credit, but that it will necessarily increase them *beyond* that point, thereby causing an actual deprivation of property without due process of law.

This may be demonstrated by a simple example. Assume a Wisconsin estate with a federal 80% credit of $100,000 which has paid valid state death taxes to Wisconsin and other states aggregating $50,000; and assume that, of these state taxes, only $40,000 are deductible in computing the Wisconsin Estate Tax, the remaining $10,000 being (like the Emergency Tax) refused deduction. The entire $50,000 of state taxes paid are still deductible against the federal basic tax, and the net amount of the 80% credit available to compensate for the levy of the Wisconsin Estate Tax is only $50,000. If, in such a situation the Wisconsin Estate Tax is computed as the excess of the 80% credit ($100,000) over the sum of those taxes only which are deductible in its computation ($40,000), it will amount to $60,000. So computed, the Wisconsin Estate Tax is greater than the difference between the federal 80% credit and the state death taxes and hence costs the tax-paying estate $10,000 more than the saving which it has effected in the federal basic tax. This is a deprivation of property, and, the Wisconsin Estate Tax being measured in part by out-of-state property, it is a deprivation without due process of law. This same result inevitably follows so long as any death tax is levied in excess of the Wisconsin Estate Tax, without being allowed deduction in its computation.

It is significant that this problem was apparently recognized by the Wisconsin Legislature when, in enacting the Wisconsin Estate Tax, it included the following provisions:

(Section 72.50)

"• • • Provided, that *such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of*

the estate of the decedent had sections 72.50 to 72.61 not been enacted. • • •" (Emphasis added)

and

(Section 72.56)

"It is hereby declared to be the intent and purpose of sections 72.50 to 72.61 to obtain for this state the benefit of the credit allowed under the provisions of said United States revenue act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose."

So far, these provisions have not been given effect by the decisions of the Wisconsin Supreme Court.

The minimum amount by which the Wisconsin Estate Tax, in the Miller Estate, will, in all events under present statutory construction, exceed the difference between the federal 80% credit and the aggregate estate death taxes may be computed as follows:

Had the Wisconsin Estate Tax never been enacted, the State death taxes payable by the estate would have been:

Wisconsin Normal Tax	$220,682.12
Wisconsin Emergency Tax	66,204.64
Illinois Inheritance Tax	35,616.26
Florida Inheritance Tax	21,709.45
Total	$344,212.47

Since the federal 80% credit is $630,709.62 this would cause the estate to pay a federal basic tax which is $286,497.15 ($630,709.62—$344,212.47) greater than it now has to pay. But the Wisconsin Estate Tax as now levied is $352,701.79. This is a "tax saving" to the estate, against the federal tax, of $286,497.15 at a cost in increased Wisconsin taxes of $352,701.79. The estate is, therefore, being deprived of property by the action of the Wisconsin Estate Tax

alone, in the minimum amount of $66,204.64, which is the amount of the Emergency Tax on the Normal Tax. To the extent that the Emergency Tax is also applied on the Wisconsin Estate Tax itself, this deprivation would be increased still further.

It must be concluded, therefore, that in spite of its own plain provisions, the Wisconsin Estate Tax is now being levied against this and other similar estates in excess of "the extent to which its payment will effect a saving or diminution in the amount of United States estate tax payable by or out of the estate of the decedent." Since the Wisconsin Estate Tax is itself measured in part by property outside the taxing jurisdiction of Wisconsin, this results, not merely in violence to the plain statutory language, but also in a deprivation of property without due process of law under the rule of *Frick v. Pennsylvania*, 268 U. S. 473 (1925) and *Treichler v. Wisconsin, supra.*

5. Conclusion

It is, therefore, the opinion of the undersigned that the decision of the Wisconsin Supreme Court, on remand in this case, presents substantial federal questions under the Fourteenth Amendment to the Constitution of the United States, both with respect to the Emergency Tax, as recomputed, and with respect to the Wisconsin Estate Tax.

Respectfully submitted,

J. Gilbert Hardgrove,
Attorney and Amicus Curiae.
Miller, Mack & Fairchild,
Of Counsel.

September 5, 1950.

P. O. Address:
735 North Water Street,
Milwaukee 2, Wisconsin.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 304

OSCAR F. TREICHLER, Executor of the Estate of Fred A. Miller,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY TO STATEMENT RE JURISDICTION BY AMICUS CURIAE

This statement is in addition to the prior Statement Opposing Jurisdiction and is by way of response to the Statement Re Jurisdiction by Amicus Curiae.

I. The Wisconsin Emergency and Estate Taxes Are Separate and Distinct

Whether or not the Wisconsin emergency inheritance tax might or might not be valid cannot affect in any way

the Wisconsin estate tax. From the very outset of this case the Wisconsin estate tax was not questioned. On the contrary, it was conceded to be valid and constitutional and that its constitutionality is not involved because the appellant was and is in no way hurt thereby as a separate and independent tax standing alone.

Standing alone the Wisconsin estate tax is clearly constitutional and thus it cannot be made unconstitutional or invalid by some other tax.

The Wisconsin estate tax is imposed by sec. 72.50 to 72.61, Wis. Stats. Said statutes were created by Ch. 426, Laws of Wisconsin of 1931. They ever since have been and now are a part of the permanent scheme of inheritance taxation in the State of Wisconsin.

The Wisconsin emergency inheritance tax, sec. 72.74 Wisconsin Statutes, was originally enacted by Section 3 of Chapter 15, Laws of 1935. The entire content of said Chapter 15 was tax measures to raise additional revenue for emergency relief purposes. Initially the provisions in Section 72.74, Statutes, imposing such emergency inheritance tax were not a part of Chapter 72 of the Wisconsin Statutes, the inheritance tax law, but were to expire July 1, 1937. However, by Chapter 32, Laws of Wisconsin, 1937 the provisions were extended to July 1, 1939, and then currently every two years thereafter the Wisconsin legislature has extended them so that they have been in effect continuously ever since.

At the time of the initial enactment of both the Wisconsin estate tax, Sections 72.50 to 72.61, and the emergency inheritance tax law, Section 72.74, Statutes, the Wisconsin "normal" inheritance tax law, Sections 72.01 to 72.24, Wisconsin Statutes, was in operation and effect and had been since 1903 when enacted by Chapter 44, Laws of Wisconsin, 1903.

The Wisconsin emergency inheritance tax law and the Wisconsin estate tax are thus entirely separate and distinct laws and wholly independent one of the other. They were enacted by different legislative enactments, at different times, and for different purposes. Neither has anything to do with the other. Either could be repealed independently of the other and without repeal of the other. The emergency inheritance tax law in Section 72.74 did not and does not now amend the Wisconsin estate tax law in Sections 72.50 to 72.61.

Much of the argument of *amicus curiae* is nothing more than an attempt to argue here as to how these two statutes are to be construed and given effect. That, however, is something wholly within the province of the state court and is of no concern of this Court.

The Supreme Court of Wisconsin in its initial decision in this case construed these two state tax laws. It very clearly said they were separate and distinct tax laws; that the Wisconsin estate tax was independent of the Wisconsin emergency inheritance tax and was to be computed without regard to said subsequently enacted emergency tax law.

The examples given by *amicus curiae* in this connection are not germane. They do not relate to the emergency inheritance tax or its applicability. They relate entirely to the matter of construction and applicability of the Wisconsin estate tax. That this is true is demonstrable by the fact that if the emergency tax were not here involved, or rather if in the present instance the Wisconsin emergency tax did not exist, there would be no basis for the same. As previously stated the Wisconsin estate tax is in no way dependent upon the emergency inheritance tax; it is computed without relation to it; and were the emergency inheritance tax repealed or nonexistent the Wisconsin estate tax here would be exactly the same. The matter of how

these two independent taxes are to be applied is a matter of construction which is of no concern to this Court so long as each of said taxes in its own independent application does not tax out-of-state property. The examples at pages 8 and 9 of the statement of *amicus curiae* have nothing to do with whether the State of Wisconsin is here taxing out-of-state property. That is the only question in the case and *amicus curiae* concedes it when at the outset of its statement it is said that the only issue here is one of due process. Examples set forth by *amicus curiae* are merely hypothetical computations of what might happen if these tax laws were different.

If the construction and application of these Wisconsin tax laws by the Supreme Court of the State of Wisconsin do not tax out-of-state property then the method of calculation of the taxes is of no concern to this Court because no federal question is presented.

II. The Construction and Application of the Wisconsin Emergency Tax by the Supreme Court of Wisconsin Is in Conformity With the Mandate of This Court.

The decision of the Supreme Court of the State of Wisconsin entered June 30, 1950 complies strictly with the mandate of this Court since it is now clear that the Wisconsin emergency tax as therein construed and applied is in no way measured by out-of-state property. Some capital is endeavored to be made out of an assumed difference between rating and measuring of a tax. Whether a tax is said to be "rated" or "measured" is a mere matter of names or labels that means nothing for it is the substance and effect of the tax that alone is of moment. This is a mere battle of names or nomenclature; a mere play on words. The constitutionality of a tax, and here particularly the Wisconsin emergency inheritance tax, as to whether or not

it taxes out-of-state property is not affected by the nomenclature. It makes no difference in this regard whether the tax rate is progressive or constant. That is merely a matter of the computation of the tax.

The Wisconsin emergency inheritance tax is not upon the estate tax but is measured or rated by it. As presently construed and applied by the Supreme Court of Wisconsin the Wisconsin emergency tax is computed in reference to only so much of the Wisconsin estate tax as might be viewed as attributable to ~~out-of-state~~ property *in the state*.

Primarily the complaint of *amicus curiae* is that the recalculation of the taxes payable in this estate as set forth in the Decision of the Supreme Court of Wisconsin effects too small a saving in taxes. It is said that the recomputation results in a reduction of only $6,453.92 in the Wisconsin emergency tax or 3.75% of the amount of said tax as previously computed, and then it is pointed out that, however, 12½% of the property of the estate was outside of Wisconsin. The percentage of the reduction has absolutely no relationship to the question attempted to be here presented. The percentage of out-of-state property stays constant. For instance, if the out-of-state taxes paid were higher and still were less than the difference between the Wisconsin normal taxes and the amount of the 80% federal credit the percentage reduction in such a case would be entirely different but the 12½% as the relationship of the out-of-state property to the total property would still be the same. In that case the Wisconsin estate tax would be less and the Wisconsin emergency tax would likewise be less. Of course, if there had been no out-of-state property in this estate and the entire property were all in Wisconsin and in the amount of the property that was in Wisconsin in this case the amount of the federal taxes would have been different and the whole situation would have been different. Any

argument of this nature is nothing more than a different way of endeavoring to state the argument made by the appellant that because of the progressive rates of the federal tax the existence of the out-of-state property throws the estate into the higher brackets and therefore when a percentage proportion of the total federal estate tax credit is taken as attributable to Wisconsin the influence of such out-of-state property in throwing the estate into the high brackets is still taxing out-of-state property.

The amount of property outside of the state does not affect the reduction in the taxes but it is the amount of the taxes paid outside of the state. If the amount of out-of-state taxes paid is less than the proportion of the federal estate tax credit attributable to out-of-state property on the basis of the percentage relationship of the out-of-state property to the total property then by the method used by the Supreme Court of Wisconsin in construing and calculating the emergency tax the influence of the out-of-state property is eliminated by deducting out of the Wisconsin estate tax upon which the emergency tax is calculated an amount which compensates therefor. But if the out-of-state taxes paid were greater than the percentage of the federal tax credit so attributable to out-of-state property then full deduction has been made and the Wisconsin emergency tax automatically diminishes accordingly. If the out-of-state taxes paid had been $300,000 in this case then the percentage reduction of the emergency tax would be about 24%. This shows that the percentage of the out-of-state property, namely 12½%, and the percentage of the reduction in the Wisconsin emergency taxes have no relationship and are of no moment.

So long as the federal tax credit used in the computation of the emergency tax is reduced by the amount thereof attributable to out-of-state property then the emergency

tax is not being measured by out-of-state property. In a case where the amount of out-of-state taxes paid is in excess of the percentage of the federal tax credit attributable to out-of-state property clearly the Wisconsin emergency tax in that case would in no way be measured by out-of-state property. It is only where the amount of taxes paid to other states is less than the percentage of the federal tax credit attributable to out-of-state property that an additional reduction for the difference must be made in the calculation of the Wisconsin emergency tax, as was done here, to eliminate any measurement of the emergency tax by out-of-state property.

It is submitted that for the reasons stated herein and in the prior Statement Opposing Jurisdiction no substantial federal question is here presented and the appeal should be dismissed.

Respectfully submitted,

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
NEIL CONWAY,
Inheritance Tax Counsel of Wisconsin,
Attorneys for Appellee, State of Wisconsin.

P. O. Address: State Capitol, Madison 2, Wisconsin.

Per Curiam Decisions.

No. 304. TREICHLER, EXECUTOR, *v.* WISCONSIN. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* Insofar as the appeal attacks the validity of the computation of appellant's tax under the Wisconsin Emergency Tax on Inheritances, Wis. Stat. (1947) § 72.74 (2), the judgment of the Wisconsin Supreme Court is affirmed. *Treichler* v. *Wisconsin*, 338 U. S. 251 (1949). Insofar as the appeal attacks the validity of the computation of appellant's tax under the Wisconsin Estate Tax, Wis. Stat. (1947) § 72.50, the appeal is dismissed, that portion of the judgment of the Wisconsin Supreme Court resting on an adequate nonfederal ground. *A. W. Schutz* for appellant. *Thomas E. Fairchild*, Attorney General of Wisconsin, *Harold H. Persons*, Assistant Attorney General, and *Neil Conway* for appellee. *J. Gilbert Hardgrove* filed a brief, as *amicus curiae*, supporting appellant. Reported below: 257 Wis. 439, 43 N. W. 2d 428.